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7 **IN THE SUPREME COURT**

8 **STATE OF ARIZONA**

9 **In the Matter of:**

**Supreme Court No.: R-**

10 **PETITION TO AMEND RULE 11, PETITION**  
11 **ARIZONA RULES OF CIVIL**  
12 **PROCEDURE**

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15 Pursuant to Rule 28 of the Rules of the Arizona Supreme Court, the Pima  
16 County Bar Association (hereinafter “the PCBA”) respectfully petitions the  
17 Court to amend Rule 11 of the Arizona Rules of Civil Procedure (“Rule 11” or  
18 “Arizona’s Rule 11”).

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20 The PCBA supports the State Bar’s pending Petition R-15-0004 regarding  
21 Rule 11 with the sole exception of the mandatory sanctions provision in  
22 proposed Rule 11(c). While the State Bar believes that Rule 11 sanctions  
23 should be mandatory, the PCBA respectfully proposes that the word “shall” be  
24 replaced by “may.”  
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1 This separate Petition is filed to address concerns raised by the State Bar  
2 in its June 25, 2015 Reply in support of its Petition R-15-0004, and to allow bar  
3 members and stakeholders to have a chance to comment on the PCBA's proposal.

4 **Exhibit A** is a redline version of proposed amended Rule 11 ("Proposed  
5 Rule 11") identifying additions and deletions. A clean version of Proposed Rule  
6 11 is attached as **Exhibit B**.

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8 **I. LAWYERS AND JUDGES AGREE THAT THE FEDERAL RULE**  
9 **11 WITH ITS NON-MANDATORY SANCTIONS IS AN**  
10 **EFFECTIVE DETERRENT TO FRIVOLOUS FILINGS.**

11 The federal court system has a long history of considering and, when  
12 appropriate, modifying Rule 11, Federal Rules of Civil Procedure ("Federal  
13 Rule 11"). Federal judges and lawyers who practice in federal court largely  
14 agree that the non-mandatory sanctions provision of the current Federal Rule 11  
15 gives judges adequate tools to deal with frivolous pleadings and to impose  
16 sanctions when warranted. Arizona should follow Federal Rule 11 as to non-  
17 mandatory sanctions.

18 The PCBA is cognizant of the ongoing work of the Court's Task Force  
19 on the Arizona Rules of Civil Procedure, and the Court's directive to "avoid  
20 unintended variation from language in corresponding federal rules." The  
21 PCBA respectfully submits that the State Bar has not provided a sufficient  
22 rationale to ignore the federal courts' experiences with Federal Rule 11 and to  
23 diverge from Federal Rule 11's non-mandatory sanctions.  
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1 Since the adoption of non-mandatory sanctions in Federal Rule 11 in  
2 1993, there have been repeated efforts in Congress to reinstate the mandatory  
3 sanctions provisions of the Federal Rule 11 adopted in 1983. The federal  
4 judiciary has repeatedly opposed such efforts. As most recently expressed on  
5 April 13, 2015, the Judicial Conference's Committee on the Rules of Practice  
6 and Procedure as well as the Conference's Advisory Committee on the Federal  
7 Rules of Civil Procedure, attempts to "restore the 1983 version of Rule 11  
8 would create a cure worse than the problem it is meant to solve." Letter from  
9 Jeffrey S. Sutton, Chair, Comm. on Rules of Practice and Procedure, and David  
10 G. Campbell, Chair, Advisory Comm. on Civil Rules, to Bob Goodlatte,  
11 Chairman, Comm. on the Judiciary, U.S. House of Representatives (April 1,  
12 2015) at 1, [http://www.afj.org/wp-content/uploads/2015/04/Judicial-](http://www.afj.org/wp-content/uploads/2015/04/Judicial-Conference-Letter.pdf)  
13 [Conference-Letter.pdf](http://www.afj.org/wp-content/uploads/2015/04/Judicial-Conference-Letter.pdf). The federal judicial response was based in part upon a  
14 2005 Report surveying district judges' experiences and views concerning Rule  
15 11 commissioned by the Federal Judicial Center. That 2005 Report noted that  
16 91% of the responding judges believed that sanctions should not be mandatory  
17 when a Rule 11 violation is found. DAVID RAUMA & THOMAS E. WILLGING,  
18 REPORT OF A SURVEY OF U.S. DIST. JUDGES' EXPERIENCES AND VIEWS  
19 CONCERNING RULE 11, FED. R. CIV. P. at 8 (Fed. Judicial Ctr. 2005),  
20 [http://www.fjc.gov/public/pdf.nsf/lookup/rule1105.pdf/\\$file/rule1105.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/rule1105.pdf/$file/rule1105.pdf).  
21 Furthermore, local anecdotal reports from the federal judiciary suggest that  
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1 Rule 11 motions are few and far between. The Federal Rule 11 appears to be  
2 working and should be followed in Arizona.

3       Similar to the federal judiciary, the federal bar has also opposed  
4 mandatory sanctions under Federal Rule 11. Leading up to the 1993 federal  
5 amendments enacting the current rule, there was a Bench-Bar Proposal which  
6 recommended making Federal Rule 11 sanctions permissive, rather than  
7 mandatory. Judge A. Leon Higginbotham, Jr., *et al.*, *Bench-Bar Proposal to*  
8 *Revise Civil Procedure Rule 11*, reprinted in JEROLD S. SOLOVY, NORMAN M.  
9 HIRSCH, MARGARET J. SIMPSON, *SANCTIONS UNDER RULE 11* app. II,  
10 [https://jenner.com/system/assets/assets/5514/original/Sanctions\\_20Under\\_20Ru](https://jenner.com/system/assets/assets/5514/original/Sanctions_20Under_20Rule_2011-Complete_2010.pdf?1323114005)  
11 [le\\_2011-Complete\\_2010.pdf?1323114005](https://jenner.com/system/assets/assets/5514/original/Sanctions_20Under_20Rule_2011-Complete_2010.pdf?1323114005). It noted that it was taking the  
12 concept from a proposal by the American College of Trial Lawyers, and  
13 recognized that “[a] major purpose of this change is to reduce the elements of  
14 lawyers fighting with each other for personal gain.” *See id.* at 8.

15       The federal bar continues to oppose legislation to roll back Federal Rule  
16 11 to its 1983 mandatory-sanctions version. The American Bar Association has  
17 found that “there is no demonstrated evidence that the existing [Federal] Rule  
18 11 is inadequate . . . [and efforts to reinstate mandatory sanctions and remove  
19 the safe harbor provisions would] “incur[] the substantial risk that the proposed  
20 changes will harm litigants by encouraging additional litigation and increasing  
21 court costs and delays.” Letter from Thomas M. Susman, Director of the  
22 Governmental Affairs Office, American Bar Association, to U.S.

Representatives (Sept. 17, 2015) at 1, [https://www.americanbar.org/content/dam/aba/uncategorized/GAO/2015sept17\\_laraletter.authcheckdam.pdf](https://www.americanbar.org/content/dam/aba/uncategorized/GAO/2015sept17_laraletter.authcheckdam.pdf).

When considering changes to Arizona’s Rule 11, the PCBA respectfully submits that the Court should consider the federal experience with Federal Rule 11 which reflects a rule that both judges and lawyers believe works with non-mandatory sanctions.

## **II. ARIZONA SHOULD FOLLOW THE FEDERAL APPROACH AND ADOPT NON-MANDATORY SANCTIONS FOR ARIZONA’S RULE 11.**

The PCBA has considered the comments of both the State Bar and the Chamber of Commerce which were submitted in conjunction with Petition R-15-0004. The PCBA believes that the federal approach of non-mandatory sanctions is appropriate.

The sole justification set forth in the State Bar’s Petition R-15-0004 for substituting “must” for “shall” is that “the heightened procedural requirements proposed in the amendments allow ample opportunity for a party or attorney in violation of the Rule to take corrective measures.” Petition R-15-0004 at 9. The Petition’s purported justification does not support a deviation from the Federal Rule 11. The federal rule also has a safe-harbor provision before a Rule 11 motion can be filed, which has been in place since 1993, and which the federal sources noted above indicate that it is working.

In its Reply regarding Petition R-15-0004, the State Bar noted the considerable discretion vested with the Superior Court under the current and

1 proposed Rule 11 because of the “appropriate sanction” language. Again, that  
2 same “appropriate sanction” language is in Federal Rule 11, specifically Rule  
3 11(c)(1). The trial court’s determination of the various issues regarding a Rule  
4 11 motion are heavily fact-based. The PCBA believes that Rule 11 should  
5 clearly vest discretion with the trial court to find a violation in the first place, to  
6 sanction or not sanction, and to craft the “appropriate” sanctions. Appropriate  
7 sanctions may be no sanctions in the particular case “if, for example, the  
8 offense was technical or de minimis, the court thought that the sanctions were  
9 not needed for their deterrent purpose, or the parties were equally at fault.”  
10 STEVEN S. GENSLER, FEDERAL RULES OF CIVIL PROCEDURE, RULES AND  
11 COMMENTARY (Thompson Reuters 2015) (citations omitted) (Rule 11 Practice  
12 Commentary).

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15 In its Reply regarding Petition R-15-0004, the State Bar noted that use of  
16 the word “must” in Rule 11 would further sanctions being imposed in a more  
17 uniform fashion than use of the word “may.” While the PCBA believes there is  
18 merit in uniformity, the PCBA respectfully disagrees that insertion of the word  
19 “must” would foster the desired result. A 1985 empirical study by the Federal  
20 Judicial Center that considered how district judges interpreted and applied the  
21 1983 amendments to Federal Rule 11 concluded that uniformity, even under the  
22 1983 amendments, was not achieved by requiring sanctions under Rule 11. SAUL  
23 M. KASSIN, AN EMPIRICAL STUDY OF RULE 11 SANCTIONS (Fed. Judicial Ctr.  
24 1985), [http://www.fjc.gov/public/pdf.nsf/lookup/rule11study.pdf/\\$file/rule11](http://www.fjc.gov/public/pdf.nsf/lookup/rule11study.pdf/$file/rule11)  
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1 study.pdf. Again, as noted by the federal judges and lawyers, the current Federal  
2 Rule 11 with non-mandatory sanctions is working well and is just.

3       Furthermore, the PCBA notes that over-zealous enforcement of Rule 11  
4 may have a chilling effect on access to the courts, especially on civil rights  
5 plaintiffs. *See* Danielle Kie Hart, *Still Chilling After All These Years: Rule 11*  
6 *of the Civil Rules of Civil Procedure and its Impact on Federal Civil Rights*  
7 *Plaintiffs After the 1993 Amendments*, 37 VAL. U. L. REV. 1, \*11 n. 31, \*14 n.  
8 39 (2002) (citations omitted). One of the lawyers representing the plaintiffs in  
9 *Brown v. Board of Education*, and who later became a federal district judge,  
10 noted: "I have no doubt that the Supreme Court's opportunity to pronounce  
11 separate schools inherently unequal [in *Brown*] would have been delayed for a  
12 decade had my colleagues and I been required, upon pain of potential sanctions,  
13 to plead our legal theory explicitly from the start." Robert L. Carter,  
14 Symposium, *The 50th Anniversary of the Federal Rules of Civil Procedure,*  
15 *1938-1988*, 137 U. PA. L. REV. 2179, 2193 (1989). In enacting a revised Rule  
16 11, the PCBA believes the Court should consider potential unintended  
17 consequences which might negatively affect access to justice.  
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21       The State Bar noted the role of the Legislature in its reply; however, it  
22 failed to note that the Arizona Legislature has already provided for sanctions to  
23 address frivolous filings under Sections, 12-349 through 12-350, Arizona  
24 Revised Statutes. These statutory provisions, along with Rule 12(b) and the  
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1 Court's inherent authority, are additional safeguards against frivolous filings  
2 which judges can use as appropriate.

3 As to the comments filed by the Chamber of Commerce with respect to  
4 Petition R-15-0004, the PCBA adopts points 1-5 of the State Bar's Reply.  
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6 **III. CONCLUSION**

7 For the foregoing reasons, the PCBA respectfully petitions this Court to  
8 amend Rule 11 of the Arizona Rules of Civil Procedure.  
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10 RESPECTFULLY SUBMITTED this 29th day of December, 2015.

11  
12 /s/ Natasha Wrae  
13 /s/ D. Greg Sakall  
14 Natasha Wrae, President  
15 D. Greg Sakall, Chair – Rules  
Committee

16 Electronic copy filed  
17 with the Clerk of the Supreme  
18 Court of Arizona this 29th day  
19 of December, 2015.

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26 By: D. Greg Sakall



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## **EXHIBIT A**

1 ~~ARIZONA RULES OF CIVIL PROCEDURE~~ (Petitioner's proposed additions are show by  
2 underscoring and proposed deletions are show by ~~strikethrough~~)  
3 Proposed Amendments to Arizona's Rule 11

4 **Rule 11(a). Signing of pleadings, motions and other papers; ~~sanctions~~**

5 Every pleading, motion, and other paper of a party represented by an attorney shall be  
6 signed by at least one attorney of record in the attorney's individual name, whose address  
7 shall be stated. A party who is not represented by an attorney shall sign the party's pleading,  
8 motion, or other paper and state the party's address. Except when otherwise specifically  
9 provided by rule or statute, pleadings need not be verified or accompanied by affidavit. ~~The~~  
10 ~~rule in equity that the averments of an answer under oath must be overcome by the testimony~~  
11 ~~of two witnesses or of one witness sustained by corroborating circumstances is abolished. If a~~  
12 ~~pleading, motion, or other paper is not signed, it must be stricken unless it is signed promptly~~  
13 ~~after the omission is called to the attention of the pleader or movant.~~

14 **Rule 11(b). Representations to the court and in other papers**

15 The signature of an attorney or party constitutes a certificate by the signer that the  
16 signer has read the pleading, motion, or other paper; that to the best of the signer's  
17 knowledge, information, and belief formed after reasonable inquiry ~~it is well grounded in fact~~  
18 ~~and is warranted by existing law or a good faith argument for the extension, modification, or~~  
19 ~~reversal of existing law; and that it is not interposed.~~

20 (1) it is not being presented for any improper purpose, such as to harass or to cause  
21 unnecessary delay, or needlessly increase in the cost of litigation;

22 (2) the claims, defenses, and other legal contentions are warranted by existing law or by a  
23 nonfrivolous argument for extending, modifying, or reversing existing law or for establishing  
24 new law;

25 (3) the factual contentions have evidentiary support or, if specifically so identified, will  
26 likely have evidentiary support after a reasonable opportunity for further investigation or  
discovery; and

(4) the denials of factual contentions are warranted on the evidence or, if specifically so  
identified, are reasonably based on a belief or a lack of information. If a pleading, motion, or  
other paper is not signed, it shall be stricken unless it is signed promptly after the omission is  
called to the attention of the pleader or movant.

**Rule 11(c). Sanctions**

(1) If a pleading, motion or other paper is signed in violation of this rule, the court,  
upon motion or upon its own initiative, ~~shall~~ may impose upon the person who signed it, a  
represented party, or both, an appropriate sanction, which may include an order to pay to the  
other party or parties the amount of the reasonable expenses incurred because of the filing of  
the pleading, including a reasonable attorney's fee.

(2) A motion for sanctions must be made separately from any other motion and must

1 describe the specific conduct that allegedly violates Rule 11(b). A request for sanctions shall  
2 not be made in any other pleading, motion or other paper filed with the court.

3 (3) Before filing a motion for sanctions under this Rule, the moving party must:

4 (A) Attempt to resolve the matter by telephonic consultation with the  
5 opposing party; and

6 (B) If the matter is not satisfactorily resolved by telephonic consultation, serve  
7 the opposing party with written notice of the specific conduct that allegedly violates Rule  
8 11(b). If the opposing party does not withdraw or appropriately correct the alleged  
9 violation(s) within 10 days after being served with the written notice, the moving party may  
10 file a motion under Rule 11(c)(2).

11 (4) A motion for sanctions under this Rule will not be considered unless it is  
12 accompanied by a separate statement of moving counsel certifying that, after telephonic  
13 consultation and good faith efforts to do so, the parties have been unable to satisfactorily  
14 resolve the matter, and attaching a copy of the written notice provided under subpart (B).

#### 15 **Rule 11(d). Assisting filing by self-represented person**

16 An attorney may help to draft a pleading, motion or document filed by an otherwise  
17 self-represented person, and the attorney need not sign that pleading, motion, or document. In  
18 providing such drafting assistance, the attorney may rely on the otherwise self-represented  
19 person's representation of facts, unless the attorney has reason to believe that such  
20 representations are false or materially insufficient, in which instance the attorney shall make  
21 an independent reasonable inquiry into the facts.

#### 22 **Rule 11(e). Verification of pleading generally**

23 When in a civil action a pleading is required to be verified by the affidavit of the party, or  
24 when in a civil action an affidavit is required or permitted to be filed, the pleading may be  
25 verified, or the affidavit made, by the party or by a person acquainted with the facts, for and  
26 on behalf of such party.

#### 27 **Rule 11(f). Verification of pleading when equitable relief demanded**

28 When equitable relief is demanded, and the party demanding such relief makes oath that the  
29 allegations of the complaint, counterclaim, cross-claim, or third-party claim are true in  
30 substance and in fact, the responsive pleading of the opposite party shall be under oath,  
31 unless the oath is waived in the pleading to which the responsive pleading is filed, and each  
32 material allegation not denied under oath shall be taken as confessed.

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## **EXHIBIT B**

**Proposed Amendments to Arizona's Rule 11**

**Rule 11. Signing of pleadings, motions and other papers; sanctions**

**Rule 11(a). Signing of pleadings, motions and other papers**

Every pleading, motion, and other paper of a party represented by an attorney shall be signed by at least one attorney of record in the attorney's individual name, whose address shall be stated. A party who is not represented by an attorney shall sign the party's pleading, motion, or other paper and state the party's address. Except when otherwise specifically provided by rule or statute, pleadings need not be verified or accompanied by affidavit. If a pleading, motion or other paper is not signed, it must be stricken unless it is signed promptly after the omission is called to the attention of the pleader or movant.

**Rule 11(b). Representations to the court and in other papers**

The signature of an attorney or party constitutes a certificate by the signer that the signer has read the pleading, motion, or other paper; that to the best of the signer's knowledge, information, and belief formed after reasonable inquiry:

(1) it is not being presented for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation;

(2) the claims, defenses, and other legal contentions are warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law or for establishing new law;

(3) the factual contentions have evidentiary support or, if specifically so identified, will likely have evidentiary support after a reasonable opportunity for further investigation or discovery; and

(4) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on a belief or a lack of information.

**Rule 11(c). Sanctions**

(1) If a pleading, motion or other paper is signed in violation of this rule, the court, upon motion or upon its own initiative, may impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, including a reasonable attorney's fee.

(2) A motion for sanctions must be made separately from any other motion and must describe the specific conduct that allegedly violates Rule 11(b). A request for sanctions shall not be made in any other pleading, motion or other paper filed with the court.

(3) Before filing a motion for sanctions under this Rule, the moving party must:

(A) Attempt to resolve the matter by telephonic consultation with the opposing party; and

(B) If the matter is not satisfactorily resolved by telephonic consultation, serve the opposing party with written notice of the specific conduct that allegedly violates

1 Rule 11(b). If the opposing party does not withdraw or appropriately correct the alleged  
2 violation(s) within 10 days after being served with the written notice, the moving party may  
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15 When equitable relief is demanded, and the party demanding such relief makes oath  
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